

Re: In re: New York City Policing During Summer 2020 Demonstrations - Conforti Privilege Log

Stoughton, Corey <CStoughton@legal-aid.org>

Fri 3/25/2022 11:01 AM

To: Weiss, Dara (Law) <daweiss@law.nyc.gov>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com <Sow-Legal@blhny.com>; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation <AG.NYPDLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>

Cc: Nelson, Genevieve (Law) <gnelson@law.nyc.gov>; Riordan, Shannon (LAW) <sriordan@law.nyc.gov>; Ibrahim, Nadine (LAW) <nibrahim@law.nyc.gov>; Breslow, Stephanie (Law) <sbreslow@law.nyc.gov>; Braun, Daniel (Law) <dbraun@law.nyc.gov>; Hamill, Bridget (LAW) <brhamill@law.nyc.gov>; Vecchiarelli, Giancarlo (LAW) <GVecchi@law.nyc.gov>

At the risk of being guilty of beating a dead horse, I want to clarify that the question isn't timing, it's substance: we'd also be happy to meet on Monday in lieu of today but if the purpose of the meeting is simply "to speak about what we believe should be in the log that is not," we have already said all there is to say about that and don't see any purpose to such a meeting. If you have other thoughts about how we could come to an agreement or reach a compromise, we are open to hearing it, but our positions as they currently stand present a stark disagreement on the question of whether Defendants have properly invoked the privilege or not and I'm at a loss to see a path to resolving this without the court deciding who is right.

Corey

From: Weiss, Dara (Law) <daweiss@law.nyc.gov>

Sent: Friday, March 25, 2022 10:50 AM

To: Stoughton, Corey <CStoughton@legal-aid.org>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com <Sow-Legal@blhny.com>; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation <AG.NYPDLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>

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Subject: RE: In re: New York City Policing During Summer 2020 Demonstrations - Conforti Privilege Log

As I noted, we are certainly willing to meet in an attempt to come to some sort of agreement, but we are simply not available today.

We will not change our position on the fact that this document is privileged, but are certainly happy to speak about what you believe should be in the log that is not

Again, we are available Monday before noon or between 1:30-2:30

From: Stoughton, Corey <CStoughton@legal-aid.org>

Sent: Friday, March 25, 2022 9:59 AM

To: Weiss, Dara (Law) <daweiss@law.nyc.gov>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation

<AG.NYPLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>

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Subject: [EXTERNAL] Re: In re: New York City Policing During Summer 2020 Demonstrations - Conforti Privilege Log

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Dara and colleagues,

We have set forth our position on what the privilege log requires now in writing, twice. That information is also in the Local Rule governing privilege logs. As I previously stated and as our draft motion sets out, Plaintiffs' position is that Defendants have waived the privilege as to records relating to the after-action review by failing to timely search for and produce responsive documents and a privilege log and twice failing to meaningfully cure that deficiency when offered the opportunity. Your consistently articulated position that the productions you have made are sufficient leaves us at an impasse and, on that basis, we intend to file our motion today. If you are willing to move off of your position on this matter and discuss producing the responsive records, we would be happy to meet and confer on that subject today.

Corey

From: Weiss, Dara (Law) <daweiss@law.nyc.gov>

Sent: Thursday, March 24, 2022 4:46 PM

To: Stoughton, Corey <CStoughton@legal-aid.org>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com <Sow-Legal@blhny.com>; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPLitigation <AG.NYPLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>

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Subject: Re: In re: New York City Policing During Summer 2020 Demonstrations - Conforti Privilege Log

Although defendants believe that the privilege log is more than sufficient, if you require more information to attempt to make a determination whether the privilege claim is proper, we are certainly happy to discuss that with you. We have no availability tomorrow, but can speak on Monday, before noon or between 1:30-2:30

Dara L. Weiss
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New York City Law Department
Special Federal Litigation
100 Church Street
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(212) 356-3509 (fax)

Daweiss@law.nyc.gov

From: Stoughton, Corey <CStoughton@legal-aid.org>

Sent: Thursday, March 24, 2022 3:20 PM

To: Weiss, Dara (Law) <daweiss@law.nyc.gov>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com <Sow-Legal@blhny.com>; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation <AG.NYPDLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>

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Counselors,

The amended log does not address the issues we raised regarding the March 4 log. In light of this, and Defendants' repeated statements during our meet and confers on this issue that they do not agree that more is required by the Federal and Local rules to invoke the privilege, for the same reasons stated in the original draft motion we shared on March 14, it appears we have reached an impasse and we intend to move the court to compel production of all documents related to the after-action review process.

I attach here a revised version of the previous motion updated to reflect the production of the March 23 amended privilege log. If Defendants are willing to reconsider their stated position, please let us know before 4 pm tomorrow, otherwise we intend to file this motion.

Corey, on behalf of the consolidated plaintiffs

From: Weiss, Dara (Law) <daweiss@law.nyc.gov>

Sent: Wednesday, March 23, 2022 4:06 PM

To: Stoughton, Corey <CStoughton@legal-aid.org>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com <Sow-Legal@blhny.com>; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation <AG.NYPDLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>

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Attached please find the amended privilege log

Dara L. Weiss
Senior Counsel
New York City Law Department
Special Federal Litigation
100 Church Street
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(212) 356-3509 (fax)
Daweiss@law.nyc.gov

From: Weiss, Dara (Law)
Sent: Tuesday, March 22, 2022 8:37 AM
To: Stoughton, Corey <CStoughton@legal-aid.org>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com <Sow-Legal@blhny.com>; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPLitigation <AG.NYPLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>
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Subject: RE: In re: New York City Policing During Summer 2020 Demonstrations - Conforti Privilege Log

It will be produced by the close of business tomorrow

From: Stoughton, Corey <CStoughton@legal-aid.org>
Sent: Monday, March 21, 2022 3:47 PM
To: Weiss, Dara (Law) <daweiss@law.nyc.gov>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPLitigation <AG.NYPLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>
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Subject: [EXTERNAL] Re: In re: New York City Policing During Summer 2020 Demonstrations - Conforti Privilege Log

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Dara and City counsel,

Contrary to your emails below, we do not appear to have received any amended privilege log relating to the NYPD's after-action review. Can you advise whether Defendants still intend to produce one and if so, when?

Corey

From: Weiss, Dara (Law) <daweiss@law.nyc.gov>
Sent: Tuesday, March 15, 2022 9:48 AM
To: Stoughton, Corey <CStoughton@legal-aid.org>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com <Sow-Legal@blhny.com>; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation <AG.NYPDLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>
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Subject: RE: In re: New York City Policing During Summer 2020 Demonstrations - Conforti Privilege Log

While we still disagree with your assessment, in a good-faith attempt to avoid burdening the Court with yet another of plaintiffs' grievances, we will provide an amended privilege log to contain the date of the draft, and materials and information gathered as part of the review process, communications related to the review, and any drafts. Please keep in mind that documents/communications used in creating the draft may not be privileged, and may have already been produced to plaintiffs.

From: Stoughton, Corey <CStoughton@legal-aid.org>
Sent: Monday, March 14, 2022 5:11 PM
To: Weiss, Dara (Law) <daweiss@law.nyc.gov>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation <AG.NYPDLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>
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Dara,

Can you please explain specifically what additional information you propose to provide in an amended privilege log? As you are taking the position that the existing privilege log fully complies with the rules, then absent more information demonstrating a willingness to address the specific issues we have raised, it appears to us that we are at an impasse and will file the attached motion tomorrow afternoon. We also want to be clear (as the letter motion details) that we have discussed the broad category of documents related to the after-action review process on multiple occasions, so we do not accept the implication that any of this is new or comes as a surprise.

Corey

From: Weiss, Dara (Law) <daweiss@law.nyc.gov>

Sent: Monday, March 14, 2022 2:24 PM

To: Stoughton, Corey <CStoughton@legal-aid.org>; Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com <Sow-Legal@blhny.com>; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation <AG.NYPDLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>

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Subject: RE: In re: New York City Policing During Summer 2020 Demonstrations - Conforti Privilege Log

Counselors:

Defendants disagree with your assertions that the Conforti Privilege Log does not meet the necessary requirements.

First of all, we do not recall any conversation about providing "all drafts and versions of the report; the materials collected or created in the after-action review process; communications related to that process and the report (including emails); among other responsive material."

Second, the privilege log provides sufficient information to allow plaintiffs to assess the claim of privilege, as required under the Federal and Local Rules.

Third, defendants have in no way waived any privilege. Plaintiffs were advised as far back as August, 2021 that defendants claim privilege over this document, and the reasons therefore. Defendants will not be producing this draft document.

Despite the foregoing, defendants will provide a revised privilege log for this draft document, with additional information, by the end of this week.

Best,
Dara

Dara L. Weiss
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Special Federal Litigation
100 Church Street
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(212)356-3517
daweiss@law.nyc.gov

From: Stoughton, Corey <CStoughton@legal-aid.org>

Sent: Tuesday, March 8, 2022 2:04 PM

To: Weng, Jenny (Law) <jweng@law.nyc.gov>; 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation <AG.NYPDLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>

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<brhamill@law.nyc.gov>; Vecchiarelli, Giancarlo (LAW) <GVecchi@law.nyc.gov>

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Dear Jenny,

We write regarding the "Conforti Privilege Log" produced by email on the evening of Friday, March 4. This log relates to NYPD's decision to commission an internal after-action report relating to the 2020 Protests, a process we understand to have been led by Assistant Chief Thomas Conforti that produced a draft or drafts of a report whose recommendations were ultimately not adopted.

The "Conforti Privilege Log" does not meet the requirements of a privilege log under Federal Rule 26(b) (5) and Local Rule 26.2(a)(2). It does not list or describe in any manner the responsive documents to which the City claims the privilege applies or provide the information required for each such document. The log merely acknowledges the commission of the report and offers a putative explanation for why the report's recommendations were not adopted. Defendants are obliged to search for and identify the specific documents responsive to Plaintiffs' document requests, which included a specific request for all documents related to such after-action reviews. The log must list all drafts and versions of the report; the materials collected or created in the after-action review process; communications related to that process and the report (including emails); among other responsive material. The log must state the type of each document; the general subject matter, the date and the author, addressees and recipients. Local Rule 26.2(a)(2)(A). The "Conforti Privilege Log" does none of those things. Without the information required by the local rules, there is no basis for claiming that the content of any document meets the criteria for the privilege and that the privilege has been preserved. Indeed, the scant nature of the "Conforti Privilege Log" suggests that the Law Department has not undertaken the basic step of requesting and reviewing responsive material for privilege and has instead invoked the privilege as an excuse not to search for responsive documents at all, despite the obligation to produce all responsive documents by July 31 of last year.

What little information Defendants have provided points to the existence of non-privileged information that has not been identified or disclosed. For example, to the extent that any documents or communications reflect the NYPD's final decision not to publish or adopt the conclusions of the after-action report, those are not pre-decisional and thus not subject to the privilege. Yet no such documents have been identified or produced. Moreover, even assuming the privilege does apply to some quantum of responsive material, the deliberative process privilege does not protect factual material gathered as part of a deliberative process, and Defendants must utilize redactions to segregate and produce such material from pre-decisional, non-final opinions and recommendations. *See Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) ("The privilege does not, . . . as a general matter, cover 'purely factual' material.") (quoting *Hopkins v. United States Dep't of Housing & Urban Dev.*, 929 F.2d 81, 85 (2d Cir.1991)); *E.B. v. N.Y.C. Bd. of Educ.*, 233 F.R.D. 289, 292 (E.D.N.Y. 2005) ("[F]actual findings and conclusions, as opposed to opinions and recommendations, are not protected.") (internal quotation marks and citation omitted). Thus, at a minimum, any data, documents, interview transcripts or other information gathered by Chief Conforti or others during the after-action review process, as well as any factual information presented in any drafts of or communications about the report, should have been produced.

The obvious defects in the "Conforti Privilege Log," especially in light of the extremely belated production of it, when responsive documents should have been produced no later than July 31, 2021, means that the City has waived the privilege. *S.E.C. v. Yorkville Advisors, LLC*, 300 F.R.D. 152, 167-68 (S.D.N.Y. 2014). Defendants must now produce all responsive documents, including all drafts of the after-action report. We ask that you let us know by Friday, March 11, a time you are available to meet and confer on this issue or, in lieu of a meet and confer, produce all responsive documents related to the NYPD's after-action review.

Sincerely,

Corey



Corey Stoughton

Attorney-in-Charge, Law Reform and Special Litigation
Criminal Defense Practice

The Legal Aid Society

199 Water Street

New York, NY 10038

Cell 646-527-0095

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Pronouns: she, her

From: Weng, Jenny (Law) <jweng@law.nyc.gov>

Sent: Friday, March 4, 2022 5:26 PM

To: 'Prakash, Swati' <Swati.Prakash@ag.ny.gov>; Daniel Lambright <dlambright@nyclu.org>; Sow-Legal@blhny.com <Sow-Legal@blhny.com>; Sierra Team <sierrateam@moskovitzlaw.com>; Molly Biklen <PayneLitigationTeam@nyclu.org>; AG-NYPDLitigation <AG.NYPDLitigation@ag.ny.gov>; Andrew Stoll <astoll@stollglickman.com>; wood <wood@klflaw.com>; Gray Legal Team-External <graylegalteam@dwt.com>; Hernandez Team <hernandez@femmelaw.com>

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Subject: In re: New York City Policing During Summer 2020 Demonstrations - Conforti Privilege Log

Hi all,

Attached please find the Conforti Privilege Log that was promised for today. Have a good weekend.

Best,
Jenny